

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RUSSELL GORDON MASCOTO,)	CIV. NO. 05-00748 HG-LEK
)	CR. NO. 00-00379 HG
Petitioner,)	
)	
vs.)	
)	
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
_____)	

UNITED STATES' RESPONSE TO MOTION UNDER
28 U.S.C. § 2255 TO VACATE, SET ASIDE OR
CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

EXHIBITS A - F

TABLE OF CONTENTS

TABLE OF AUTHORITIES

EDWARD H. KUBO, JR. 2499
United States Attorney
District of Hawaii

THOMAS MUEHLECK 3591
Assistant U.S. Attorney
Room 6-100, PJKK Federal Building
300 Ala Moana Blvd.
Honolulu, Hawaii 96850
Telephone: 541-2850
Facsimile: 541-2958
Tom.Muehleck@usdoj.gov

Attorneys for Plaintiff
UNITED STATES OF AMERICA

Table of Contents

	<u>Page(s)</u>
Table of Authorities	i-ii
I. FACTUAL BACKGROUND	1
II. ARGUMENT	3
A. Ineffective Assistance of Counsel Allegations	4
B. Ameline/Booker Allegation	12
III. CONCLUSION	16

Table of Authorities

<u>Cases</u>	<u>Page(s)</u>
<u>Shah v. United States</u> , 878 F.2d 1156 (9th Cir.), <u>cert. denied</u> , 493 U.S. 869 (1989)	15
<u>Shraiar v. United States</u> , 736 F.2d 817 (1st Cir. 1984)	15
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	10, 11
<u>United States v. Abarca</u> , 985 F.2d 1012 (9th Cir. 1993)	8
<u>United States v. Alfeche</u> , 942 F.2d 697 (9th Cir. 1991)	9, 11
<u>United States v. Asuncion</u> , 973 F.2d 769 (9th Cir. 1992)	9, 11
<u>United States v. Buckland</u> , 259 F.3d 1157 (9th Cir. 2001)	1, 2
<u>United States v. Cardenas</u> , 67 F.3d 1048 (9th Cir. 2005)	13, 14
<u>United States v. Johnson</u> , 67 F.3d 200 (9th Cir. 1995)	8
<u>United States v. Quan</u> , 789 F.2d 711 (9th Cir.), <u>cert. denied</u> , 478 U.S. 1044 (1986)	15
<u>United States v. Rusher</u> , 966 F.2d 868 (4th Cir. 1992), <u>cert. denied.</u> , 506 U.S. 926 (1992)	10, 11
<u>United States v. Schaflander</u> , 743 F.2d 714 (9th Cir. 1984)	14, 15
<u>United States v. Stoner</u> , 927 F.2d 45 (1st Cir. 1991), <u>cert. denied</u> , 502 U.S. 840 (1991)	11

<u>Rules and Statutes</u>	<u>Page(s)</u>
21 U.S.C. § 841(a)(1)	1
21 U.S.C. § 841(b)(1)(A)	1, 2
21 U.S.C. § 841(b)(1)(B)(viii)	4
28 U.S.C. § 2255	1, 3, 14

UNITED STATES' RESPONSE TO MOTION
UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE OR
CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

The United States of America ("United States"), by the undersigned attorney, hereby responds to Russell Gordon Mascoto's ("Mascoto") motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255.

I. FACTUAL BACKGROUND

On September 14, 2000, a one count indictment was filed in the United States District Court, District of Hawaii, charging Mascoto with knowingly and intentionally possessing with intent to distribute a quantity of crystal methamphetamine - "ice," in excess of 50 grams, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1).

On October 4, 2000, a Memorandum of Plea Agreement ("Plea Agreement") was filed in the United States District Court, District of Hawaii, and was signed by Mascoto, his attorney Myles Breiner ("Breiner"), Elliot Enoki (First Assistant U.S. Attorney) and the undersigned attorney. In this memorandum, Mascoto pled guilty to the exact charges in the indictment and specifically acknowledged possessing approximately eight ounces, or approximately 226 grams, of crystal methamphetamine. (A copy of the Plea Agreement is attached hereto as Exhibit A).

On September 7, 2001, at the sentencing hearing, this Court found that 21 U.S.C. § 841(b)(1)(A) was unconstitutional based on the panel decision in United States v. Buckland, 259

F.3d 1157 (9th Cir. 2001); and thus, refused to impose the mandatory minimum ten years of imprisonment, which Mascoto was exposed to under 21 U.S.C. § 841(b)(1)(A). Over the United States' objection, this Court sentenced Mascoto to 87 months imprisonment. The judgment was entered on October 29, 2001.

On November 2, 2001, the United States filed a Notice of Appeal.

On December 9, 2002, an unpublished decision by a panel of the United States Court of Appeals for the Ninth Circuit was filed. In the decision, the panel vacated and remanded for re-sentencing based upon the then recent en banc decision in United States v. Buckland, 289 F.3d 558, 565-66 (9th Cir. 2002)(en banc), which reversed the panel decision in United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001), which this Court relied on in declining to impose the ten year mandatory minimum sentence as required under 21 U.S.C. § 841(b)(1)(A).

On December 8, 2003, this Court re-sentenced Mascoto to the mandatory minimum sentence of 120 months imprisonment. In doing so, however, this Court granted Mascoto's downward departure from the Guideline range of 135 to 168 months.

On December 19, 2003, Mascoto filed a Notice of Appeal appealing his sentence.

On November 23, 2004, an unpublished decision by a panel of the United States Court of Appeals for the Ninth Circuit

was filed. In the decision, the panel concluded that Mascoto knowingly and voluntarily waived his statutory right of appeal, and there was no upward departure that would trigger the exception to his waiver. Therefore, the panel dismissed Mascoto's appeal.

On December 5, 2005, Mascoto filed a Motion to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody Pursuant to 28 U.S.C. § 2255. (A copy of Mascoto's 2255 is attached hereto as Exhibit B).

II. ARGUMENT

A district court may grant relief under § 2255 if it determines that "the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255.

Mascoto raises two grounds in his § 2255 motion:

- (1) That he was denied effective assistance of counsel because he was "misrepresented" into pleading to a "faulty" plea agreement; and
- (2) That "new rulings" in the Ninth Circuit would allow the sentencing judge to "rule differently."

(Exhibit B at p. 5-7).

For the reasons set forth below, Mascoto's § 2255 motion fails to state a claim upon which relief can be granted.

A. Ineffective Assistance of Counsel Allegations

In Ground One of his § 2255 motion, Mascoto claims that he was denied effective assistance of counsel because his counsel "misrepresented" him into pleading guilty to the charges in the indictment instead of pleading to a lesser charge. (Exhibit B at p. 5). Specifically, Mascoto alleges that he should have pled guilty under 21 U.S.C. § 841(b)(1)(B)(viii), which carries a mandatory minimum of 5 years of imprisonment, instead of 21 U.S.C. § 841(b)(1)(A)(viii), which requires a mandatory minimum of 10 years of imprisonment. (Exhibit B at p. 5). However, there is absolutely no evidence in the record that shows Mascoto was coerced or forced into signing his plea agreement by his counsel. The evidence in the record shows that Mascoto freely and voluntarily entered into the plea agreement.

On October 4, 2000, at the change of plea hearing, this Court carefully examined and questioned Mascoto to determine whether his guilty plea was knowing and voluntary. (A copy of the October 4, 2000 plea hearing transcript is attached hereto as Exhibit C). Also, this Court orally recited the possible statutory minimum and maximum penalties Mascoto was subjected to by pleading guilty to the charges. (Exhibit C at p. 10-11).

After this Court recited the charges in the indictment, the following colloquy took place:

THE COURT: Do you understand that there is a mandatory minimum term of ten years for this charge?

MR. MASCOTO: Yes, Your Honor...

THE COURT: The court finds the defendant understands the nature of the charge to which the plea is being entered, the mandatory minimum term of ten years, and the maximum possible penalties provided by law.

THE COURT: Now, Mr. Mascoto, has anyone threatened you or anyone else, or forced you in any way to plead guilty?

MR. MASCOTO: No, Your Honor.

(Exhibit C at p. 10-11).

This Court then asked the United States to describe the essential terms of the plea agreement. After the United States summarized the major provisions of the plea agreement, the following exchange occurred:

THE COURT: ...Mr. Breiner [Mascoto's counsel], do you believe that the essential terms of the plea agreement have been correctly stated?

MR. BREINER: Yes, I do, Your Honor.

THE COURT: Mr. Breiner, have you discussed the plea agreement with your client?

MR. BREINER: I have, yes.

THE COURT: Do you believe that he understands it?

MR. BREINER: Yes, I do, Your Honor.

THE COURT: And are you in agreement with its terms?

MR. BREINER: I am.

THE COURT: Now, Mr. Breiner, if you have it there, would you indicate your signature, and have your client identify his signature?

MR. BREINER: Thank you, Your Honor. Your Honor, I have the original memorandum of plea agreement in front of me. It is my original signature. I witnessed Mr. Mascoto signing his original signature above mine.

THE COURT: Mr. Mascoto, is that your signature, indicating your agreement to the plea agreement?

MR. MASCOTO: Yes, Your Honor...

THE COURT: Now, Mr. Mascoto, has anyone attempted in any way to force you to plead guilty?

MR. MASCOTO: No, Your Honor.

THE COURT: Are you pleading guilty on your own free will, because you are guilty?

MR. MASCOTO: Yes, Your Honor.

(Exhibit C at p. 13-15).

This Court asked Mascoto what he did to make him guilty of the charge in the indictment.

THE COURT: Now, Mr. Mascoto, what did you do that makes you guilty of this charge?

MR. MASCOTO: I held crystal meth...I had crystal meth, for distribution...

THE COURT: Okay. And you had how much ice in your home on that date?

MR. MASCOTO: Approximately 226 grams.

(Exhibit C at p. 17-18).

After a thorough examination of all of the facts gathered at the hearing, this Court found that Mascoto was fully competent and capable of entering an informed plea; that his plea of guilty was a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense; and that his plea was accepted and he was adjudged guilty of that offense. (Exhibit C at p. 18-19).

In paragraph 8 of the Plea Agreement filed on October 4, 2000, Mascoto admits that he possessed approximately eight ounces, or approximately 226 grams of crystal methamphetamine on September 7, 2000. (Exhibit A at p. 3). Mascoto also acknowledged in Paragraph 7 of this agreement that he understood that the term of imprisonment for the charge he was pleading guilty to was not less than 10 years. (Exhibit A at p. 2).

Therefore, Mascoto admitted to possessing more than 50 grams of crystal methamphetamine and acknowledging that he understood that his guilty plea was subjected to not less than 10 years imprisonment at the change of plea hearing and in the Plea Agreement.

There is absolutely no evidence that Mascoto was forced or coerced into entering his guilty plea at the hearing or in the Plea Agreement.

Mascoto unsuccessfully raised the issue of not knowingly and voluntarily consenting to the terms of his plea

agreement on appeal to the Ninth Circuit. Mascoto asked the Ninth Circuit to review whether he knowingly and voluntarily waived the right to appeal his sentence. In a three panel decision, the Ninth Circuit concluded that Mascoto waived his statutory right of appeal. (A copy of the Ninth Circuit's decision filed on November 23, 2004 is attached hereto as Exhibit D). The panel stated, [o]ur precedents establish that a knowing and voluntary waiver of the right to appeal, contained in the plea agreement, bars a defendant's attempt to appeal a conviction or sentence even in the light of an intervening change in the law, or of newly discovered evidence. (Exhibit D at p. 3, citing United States v. Johnson, 67 F.3d 200, 202 (9th Cir. 1995) and United States v. Abarca, 985 F.2d 1012, 1013 (9th Cir. 1993)).

A laboratory analysis revealed that the substance Mascoto possessed had a net weight of 231.7 grams and contained d-methamphetamine hydrochloride at a purity of 72%. The analysis also showed that the amount of 100% pure d-methamphetamine hydrochloride was 166.8 grams.

After discovering the results of this laboratory analysis, Mascoto attempted to withdraw his guilty plea because he insisted that the substance he possessed with not crystal methamphetamine or "ice", but rather a mixture containing less than 80% d-methamphetamine hydrochloride. Mascoto argued that his guilty plea was not knowing and voluntary because he was

unaware at the time of his plea that the indictment and his Plea Agreement erroneously alleged possession of a drug type different from the type of drug that he actually possessed. This Court and the Ninth Circuit rejected this argument.

At the re-sentencing hearing on December 8, 2003, this Court stated, "Well, I understand and appreciate that at the time of the original sentencing everyone was unclear...[b]ut Mr. Muehleck's [Assistant United States Attorney] point is, it doesn't make any difference. And, unfortunately, I think that is the case law. I don't see how to get around that." (A copy of the December 8, 2003 sentencing hearing transcript is attached hereto as Exhibit E).

Even Mascoto's appellate counsel acknowledged in his opening appellate brief that the Ninth Circuit rejected this same argument. (A copy of Mascoto's Opening Brief is attached hereto as Exhibit F). Mascoto's appellate counsel stated, "In making this argument, however, Mascoto notes that certain published cases in the Ninth Circuit have rejected similar arguments made by defendants in the past." (Exhibit F at p. 13). Mascoto's appellate counsel noted that the following cases have all rejected similar arguments: United States v. Alfeche, 942 F.2d 697, 698-99 (9th Cir. 1991)(119.6 grams of pure methamphetamine contained within 121.9 grams of mixture satisfied the former 100 gram limit for 10 year mandatory minimum sentence); United States

v. Asuncion, 973 F.2d 769, 773 (9th Cir. 1992)("pure" methamphetamine may be extracted from a methamphetamine mixture for mandatory minimum sentence determination); and United States v. Risher, 966 F.2d 868, 879 (4th Cir. 1992), cert. denied., 506 U.S. 926, 113 S.Ct. 351 (1992)(former 10 gram limit for methamphetamine was satisfied by possession of 72 grams of 86% pure methamphetamine). (Exhibit F at p. 13-14).

Mascoto's ineffective assistance of counsel should be rejected because there is absolutely no evidence that Mascoto's counsel ever "misrepresented" Mascoto into pleading guilty to the indictment or signing the Plea Agreement. There is no evidence that Mascoto's counsel knew about the laboratory analysis prior to advising Mascoto to plead guilty to the charge. There is absolutely no evidence that Mascoto was coerced or forced into pleading guilty. The evidence shows that his guilty plea was knowing and voluntary.

The Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), set forth a two prong test for determining whether a criminal defendant received ineffective assistance of counsel. In order for a criminal defendant's sentence to be overturned based on ineffective assistance of counsel, the defendant must prove: (1) the performance of counsel was so deficient that he or she was not functioning as "counsel" as guaranteed under the Sixth Amendment; and (2) that the deficient performance

prejudiced the defendant by depriving him of a fair trial. Id. at 691-92. In determining whether counsel's performance was deficient, an objective standard of reasonableness is applied, indulging a strong presumption that a counsel's conduct "falls within the wide range of reasonable professional assistance." Id. at 689. To be prejudicial, a reasonable probability must exist that, but for counsel's conduct, the result of the trial would have been different. Id. at 694.

Mascoto cannot prove either of the two prongs under Strickland. There is absolutely no evidence that Mascoto's counsel's performance fell below an objective standard of reasonableness under prevailing norms.

Moreover, Mascoto was not prejudiced because the laboratory analysis did not make any difference in determining Mascoto's sentence. The Ninth Circuit and other appellate courts have rejected identical arguments. See United States v. Alfeche, supra; United States v. Asuncion supra; United States v. Rusher, supra; and United States v. Stoner, 927 F.2d 45, 46 (1st Cir. 1991), cert. denied, 502 U.S. 840 (1991). Mascoto would still be subjected to the 10 year mandatory minimum sentence.

As the Strickland court stated: "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence" Strickland at 689.

B. Ameline/Booker Allegation

In Ground Two of his 2255 motion, Mascoto seems to be challenging his conviction and sentence based on an Ameline/Booker argument. (Exhibit B at p. 6-7).

However, in the Plea Agreement, Mascoto waived all § 2255 challenges except for upward departures and claims of ineffective assistance of counsel.

Paragraph 11 of the Memorandum of Plea Agreement provides in relevant part:

- a. **The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, United States Code, Section 2255, except that the defendant may make such a challenge (1) as indicated in subparagraph "b" below, or (2) based on a claim of ineffective assistance of counsel.**
- b. If the Court in imposing sentence departs (as that term is used in Part K of the Sentencing Guidelines) upward from the guideline range determined by the Court to be applicable to the Defendant, the Defendant retains the right to appeal the upward departure portion of his sentence and the manner in which that portion was determined under section 3742 and to challenge that portion of his sentence in a collateral attack.

(Exhibit A at p. 4-5)(emphasis added).

This waiver was also orally recited at the plea hearing on October 4, 2000 in front of this Court. This Court asked the United States to describe the essential terms of the plea

agreement. The following is the United States' recitation, in relevant part:

MR. MUEHLECK: ...The defendant agrees to waive his appellate rights, that is, he agrees to give up his right to challenge the way the sentence is computed, the way the sentence guidelines are determined. The defendant only agrees, or only keeps his right to challenge the sentence based upon incompetence of counsel, or if the court departs above the sentencing guidelines range, then the defendant reserves his right to challenge the sentence based upon that. ***In all other regards, including a collateral attack under Section 2255, the defendant gives up, or waives, his right to appeal the sentence...***

(Exhibit C at p. 12-13)(emphasis added).

Although Mascoto entered into his Plea Agreement before Booker was decided, his waiver of appeal is still enforceable. The Ninth Circuit has held that Booker has no effect on the sentence of a defendant who has validly waived his right to appeal because "a change in the law does not make a plea involuntary and unknowing." United States v. Cardenas, 67 F.3d 1048 (9th Cir. 2005). Likewise, in United States v. Cortez-Arias, the Ninth Circuit held that [an] express and generally unrestricted waiver of appeal rights forecloses the objections now asserted by [a defendant] pursuant to Booker or Ameline." 403 F.3d 1111, 1114 n.8 (9th Cir. 2005), as amended, 425 F.3d 547 (9th Cir. 2005).

This Court did not depart upward from the Guideline range in sentencing Mascoto so the exception in Paragraph 11(b) of the Plea Agreement does not apply. Mascoto's applicable Sentencing Guideline range was 135 to 168 months given his criminal history category and offense level. In fact, this Court actually departed downward from the guideline range, over the objection of the United States, to 120 months, the statutory mandatory minimum.

Therefore, not only did Mascoto waive his right to appeal or to collaterally attack this issue in a 2255 motion, but there are no potential Ameline or Booker issues present. In Cardenas, the Ninth Circuit stated that "Booker does not bear on mandatory minimums." United States v. Cardenas, 405 F.3d at 1048.

Section 2255 provides that a court shall hold an evidentiary hearing on a prisoner's § 2255 motion "unless the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. The Ninth Circuit has held, however, that the standard for an evidentiary hearing is whether the prisoner has made specific factual allegations, which if true, state a claim on which relief can be granted. United States v. Schaflander, 743 F.2d 714, 717 (9th Cir. 1984), cert. denied, 470 U.S. 1058 (1985). Mere conclusory statements are insufficient to require a hearing. Id. at 721.

The allegations of the prisoner need not be accepted as true to the extent they are contradicted by the record in the case. United States v. Quan, 789 F.2d 711, 715 (9th Cir.), cert. denied, 478 U.S. 1044 (1986); Shraiar v. United States, 736 F.2d 817, 818 (1st Cir. 1984). In addition, no hearing is required where the movant's allegations, when viewed against the records, either fail to state a claim for relief or are so palpably incredible as to warrant summary dismissal. Shah v. United States, 878 F.2d 1156, 1158 (9th Cir.), cert. denied, 493 U.S. 869 (1989); United States v. Schaflander, supra.; United States v. Quan, supra.

In the instant case, Mascoto has utterly failed to make a prima facie case for any of his § 2255 claims as he has not articulated in any way how counsel's performance was deficient and how his counsel's alleged deficient representation prejudiced him. Moreover, his Ameline/Booker argument fails to state a claim upon which relief can be granted because Mascoto waived his right to appeal this issue in his Plea Agreement; and alternatively, there are no potential Ameline/Booker issues present because there were no sentence enhancements and Mascoto was subjected to a statutory mandatory minimum sentence, which he received.

III. CONCLUSION

The allegations in Mascoto's § 2255 motion do not state a claim upon which relief can be granted.

For the foregoing reasons, the United States requests that Mascoto's § 2255 motion be denied without an evidentiary hearing.

Since Mascoto's § 2255 motion is without merit and should be denied summarily without an evidentiary hearing, Mascoto's request to vacate and remand his sentence should likewise be denied.

DATED: January 30, 2006, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By /s/ Thomas Muehleck
THOMAS MUEHLECK
Assistant U.S. Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that, on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at his last known address:

Served by First Class Mail:

Mr. Russell Gordon Mascoto
USM No. 87887-022
USP Lompoc
3901 Klein Blvd.
Lompoc, CA 93436

January 30, 2006

/s/ Rowena N. Kang